Razshah Enterprise Sdn Bhd v Arab Malaysian Finance Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–1335 OF 2005
TENGKU BAHARUDIN SHAH, LOW HOP BING AND ABDUL MALIK ISHAK JJCA
30 OCTOBER 2008

Civil Procedure — Locus standi — Guarantor to loan agreement — Guarantor filing counterclaim against lender based on lender's communications to borrower — Whether loan agreement evinced a tripartite relationship between lender, borrower and guarantor — Whether guarantor had locus standi to bring counterclaim

Civil Procedure — Striking out — Counterclaim — Application not specifying relevant limb of O 18 r 19 of the Rules of the High Court 1980 — Whether application flawed – Rules of the High Court 1980 O 18 r 19

Civil Procedure — Striking out — Counterclaim — Delay in making application — Delay, how reckoned — Whether delay an inordinate delay

Contract — Guarantee — Contract of guarantee — Whether contract a contract of guarantee, how ascertained

Contract — Loan agreement — Construction of — Whether loan agreement a contract of guarantee

Contract — Privity of contract — Doctrine of privity of contract — Whether doctrine expressly provided for in Contracts Act 1950 — Whether doctrine applicable in Malaysia

The plaintiff was a licensed finance company and the defendant was a duly incorporated company. The defendant guaranteed a loan extended by the plaintiff to one of its (defendant's) directors ('the borrower') by executing a first legal charge over its lands in the plaintiff's favour. The borrower defaulted and despite loan restructuring attempts and repayments made in pursuance thereof, the borrower remained in default. The plaintiff called on

A the defendant as guarantor to fully settle the outstanding amount on the loan, and when it failed to realise the outstanding amount the plaintiff moved to foreclose the defendant's lands. The plaintiff filed a charge action in the High Court at Ipoh on 9 July 1988. On 14 December 1992, Mohtar J, inter alia, refused to grant the plaintiff an order-for-sale on the basis that there was
B 'cause to the contrary'. On 26 September 1994, the parties entered into a consent order to convert the action into a writ action. The plaintiff's originating summons and various affidavits in support were accordingly converted into a statement of claim and related pleadings. The defendant's affidavits were converted into a statement of defence and counterclaim. The
C defendant's counterclaim was based on two letters from the plaintiff to the borrower. On 29 July 1997, the matter came before PS Gill J who held that the matter was res judicata and dismissed the plaintiff's action and the defendant's counterclaim. Both parties appealed to the Court of Appeal which remitted the matter to the High Court with directions for both parties
D to file and serve their pleadings. The parties thus filed and served their pleadings. On 17 December 2003, the plaintiff applied under O 18 r 19 of the Rules of the High Court 1980 ('RHC') to strike out the defendant's counterclaim filed on 21 October 2003. The High Court judge allowed the
E plaintiff's application on the basis that: (i) the defendant was not a party to the loan agreement and (ii) the defendant had no locus standi to file the counterclaim. The defendant thus appealed to the Court of Appeal.

F **Held**, allowing the defendant's appeal with costs:

(1) The plaintiff's application was flawed since it failed to specify under what limb of O 18 r 19 of the RHC, the application was made (see para 47); *Sambu (M) Sdn Bhd v Stone World Sdn Bhd & Anor* [1996] MLJU 510 followed; *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd & Anor* [1999] 4 MLJ 629 referred and *Malayan United Finance Bhd lwn Cheung Kong Plantation Sdn Bhd dan lain-lain* [2000] 2 MLJ 38 referred.

(2) The plaintiff was 9 years, 2 months, 21 days late in making its application. The delay was reckoned by reference to the time between 26 September 1994 — when the consent order was made to convert the charge action and affidavits into the writ action and related pleadings, to 17 December 2003 — when the plaintiff filed its striking out application. Even assuming that the delay was 1 month and 26 days as alleged by the plaintiff, reckoned from 21 October 2003 — the date the defendant filed its counterclaim to 17 December 2003 — the date the plaintiff filed its application, such delay could not be condoned. The delay of 9 years, 2 months and 21 days in the instant case was inordinately long (see paras 48 & 51).

(3) The doctrine of privity of contract is a creature of the common law. Although the Contracts Act 1950 does not expressly provide for the doctrine, nevertheless the doctrine applies in Malaysia (see para 59); *Fima Palmbulk Services Sdn Bhd v Suruhanjaya Pelabuhan Pulau Pinang & Anor* [1988] 1 MLJ 269, followed and *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170, PC referred.

(4) In the instant case, the loan agreement was a contract of guarantee. In order to ascertain whether a contract was one of guarantee or otherwise, one had to look at: (i) the natural meaning to be attached to the words employed in the contract; (ii) the substantial character of the contract itself and (iii) the nature of the transaction between the parties (see paras 69–70).

(5) The loan agreement clearly evinced a tripartite relationship between the parties. The defendant created a legal charge over its lands in favour of the plaintiff to secure the loan facility extended to the borrower. The defendant thus had the locus standi to file the counterclaim against the plaintiff. If the defendant had no locus standi, there was no reason for the plaintiff to sue the defendant. The borrower could not exist without the defendant and the defendant was not a stranger to the loan agreement. The counterclaim was not plainly or evidently unsustainable in law and should not have been struck out (see para 73).

[Bahasa Malaysia summary

Plaintif adalah syarikat kewangan berlesen dan defendan adalah sebuah syarikat yang diperbadankan. Defendan menjamin satu pinjaman yang diberikan oleh plaintif kepada salah seorang pengarah defendan ('peminjam') dengan menyempurnakan satu caj undang-undang ke atas tanah-tanahnya dengan berpihak kepada plaintif. Peminjam telah ingkar dan walaupun cubaan menstruktur semula pinjaman dan bayaran balik dibuat berikutan pinjaman tersebut, namun peminjam masih ingkar. Plaintif menyuruh defendan sebagai penjamin untuk menyelesaikan secara penuh jumlah tertunggak pinjaman tersebut, dan apabila ia gagal menjelaskan jumlah tertunggak tersebut plaintif meneruskan untuk menghalang tebus tanah-tanah defendan tersebut. Plaintif memfailkan tindakan gadaian di Mahkamah Tinggi di Ipoh pada 9 Julai 1988. Pada 14 Disember 1992, Mohtar H, antara lain, menolak untuk membenarkan plaintif satu perintah untuk jualan berdasarkan bahawa terdapat 'sebab disebaliknya'. Pada 26 September 1994, pihak-pihak tersebut telah memasuki satu perintah persetujuan untuk menukar tindakan tersebut kepada tindakan writ. Saman pemula plaintif dan pelbagai afidavit sokongan telah ditukarkan kepada pernyataan tuntutan dan pliding-pliding yang berkaitan. Afidavit-afidavit defendan telah ditukarkan kepada pernyataan pembelaan dan tuntutan balas.

Tuntutan balas defendan adalah berdasarkan dua surat daripada plaintif kepada peminjam. Pada 29 Julai 1997, perkara tersebut dibawa ke hadapan PS Gill J yang memutuskan bahawa perkara tersebut adalah res judicata dan menolak tindakan plaintif dan tuntutan balas defendan. Kedua-dua pihak merayu kepada Mahkamah Rayuan yang telah meremitkan perkara tersebut ke Mahkamah Tinggi dengan arahan-arahan bagi kedua-dua pihak untuk memfail dan menyampaikan pliding-pliding mereka. Pada 17 Disember 2003, plaintif memohon di bawah O 18 r 19 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') untuk mengenepikan tuntutan balas defendan yang difailkan pada 21 Oktober 2003. Hakim Mahkamah Tinggi membenarkan permohonan plaintif berdasarkan: (i) defendan bukan pihak kepada perjanjian pinjaman tersebut dan (ii) defendan tidak mempunyai locus standi untuk memfail tuntutan balas tersebut. Defendan kemudiannya merayu kepada Mahkamah Rayuan.

Diputuskan, membenarkan rayuan defendan dengan kos:

(1) Permohonan plaintif adalah cacat kerana ia gagal untuk menyatakan di bawah bahagian mana A 18 k 19 KMT, permohonan tersebut dibuat (lihat perenggan 47); *Sambu (M) Sdn Bhd v Stone World Sdn Bhd & Anor* [1996] MLJU 510 diikut; *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd & Anor* [1999] 4 MLJ 629 dirujuk dan *Malayan United Finance Bhd lwn Cheung Kong Plantation Sdn Bhd dan lain-lain* [2000] 2 MLJ 38 dirujuk.

(2) Plaintif lewat selama 9 tahun, 2 bulan dan 21 hari di dalam membuat permohonan. Kelewatan itu dikira dengan membuat rujukan kepada masa di antara 26 September 1994 — apabila perintah persetujuan dibuat untuk menukarkan tindakan gadaian dan afidavit-afidavit kepada tindakan writ dan pliding-pliding berkaitan, ke 17 Disember 2003 — apabila plaintif memfail permohonan pembatalan. Walaupun dengan mengandaikan kelewatan itu adalah 1 bulan dan 26 hari seperti yang didakwa oleh plaintif, dikira dari 21 Oktober 2003 — tarikh defendan memfail tuntutan balasnya hingga ke 17 Disember 2003 — tarikh plaintif memfail permohonannya, kelewatan sedemikian tidak boleh diterima. Kelewatan 9 tahun, 2 bulan dan 21 hari di dalam kes ini adalah luarbiasa panjang (lihat perenggan 48 & 51).

(3) Doktrin priviti kontrak adalah pembentukan daripada *common law*. Walaupun Akta Kontrak 1950 tidak secara jelas memperuntukkan doktrin tersebut, namun begitu doktrin tersebut terpakai di Malaysia (lihat perenggan 59); *Fima Palmbulk Services Sdn Bhd v Suruhanjaya Pelabuhan Pulau Pinang & Anor* [1988] 1 MLJ 269, diikut dan *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170, PC dirujuk.

(4) Di dalam kes ini, perjanjian pinjaman adalah sebuah kontrak jaminan. Untuk memastikan sama ada sesuatu kontrak adalah satu jaminan atau sebaliknya, seseorang perlu melihat pada (i) makna asal yang dilampirkan kepada perkataan-perkataan yang digunakan di dalam kontrak tersebut; (ii) ciri substansial kontrak tersebut dan (iii) sifat transaksi di antara pihak-pihak (lihat perenggan 69–70).

(5) Perjanjian pinjaman jelas memperlihatkan satu hubungan tiga pihak di antara pihak-pihak. Defendan membentuk satu caj undang-undang ke atas tanah-tanahnya dengan berpihak kepada plaintif untuk menjamin kemudahan perjanjian tersebut diberikan kepada peminjam. Defendan oleh itu mempunyai locus standi untuk memfail tuntutan balas terhadap plaintif. Jika defendan tidak mempunyai locus standi, tidak terdapat sebab untuk plaintif menyaman defendan. Peminjam tidak boleh wujud tanpa defendan dan defendan bukanlah asing kepada perjanjian pinjaman tersebut. Tuntutan balas tersebut bukan secara biasa atau jelas tidak boleh dikekalkan dalam undang-undang dan tidak sepatutnya dibatalkan (lihat perenggan 73).]

Notes

For a case on loan agreement generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4354.

For cases on counterclaim generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6704–6706.

For cases on guarantee generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3809–4093.

For cases on locus standi generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4669–4668.

Cases referred to

AA Davison Pty Ltd v Seabrook (1931) 37 ALR 156 (refd)

Affin Bank Bhd v Eye Bee Sdn Bhd [2005] 7 MLJ 1, HC (refd)

Bancroft v Milligan (1913) 16 DLR 648, SC (refd)

Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman; Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman & Ors [1987] 2 MLJ 633, HC (refd)

Beddall v Maitland (1881) 17 Ch D 174, Ch D (refd)

Bradley Bros Ltd v Scott [1923] NZLR 1050, SC (refd)

Browing and Another, Assignees of Morgan, a Bankrupt v Stallard [1814] 5 Taunt 450; 128 ER 764 (refd)

Colwell v Hatfield And Another [1832] 1 NBR 282, SC (refd)

Commercial Banking Co of Sydney Ltd v Patrick Intermarine Acceptances Ltd (In Liq) & Anor (1978) 52 ALJR 404, PC (refd)

Darlington Borough Council v Wiltshier Northern Ltd & Anor [1995] 1 WLR 68, CA (refd)

Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd [1965] NSWR 1504 (refd)
Doree Industries (M) Sdn Bhd & Ors v Sri Ram & Co (sued as a firm) & Ors [2001] 6 MLJ 532, HC (refd)
Edwards v Lennon (a) [1866] 6 SCR (NSW) Eq 18 (refd)
FC Seck Trading As Oversea Structural Company v Wong And Lee [1940] MLJ 182, CA (refd)
Fima Palmbulk Services Sdn Bhd v Suruhanjaya Pelabuhan Pulau Pinang & Anor [1988] 1 MLJ 269, HC (folld)
General Surety and Guarantee Co Ltd v Francis Parker Ltd (1977) 6 BLR 16 (refd)
Jamir Hassan v Kang Min [1992] 2 MLJ 46, HC (refd)
Jowitt v Callaghan (1938) 38 SR (NSW) 512 (refd)
Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170, PC (refd)
Law Kam Loy & Anor v Boltex Sdn Bhd & 5 Ors [2005] 4 AMR 525, CA (refd)
Loh Eng Leong & Ors v Lo Mu Sen & Sons Sdn Bhd & Anor [2000] 5 MLJ 529; [1999] 5 CLJ 510, HC (refd)
Low Fong Mei & Anor v Ko Teck Siang & Ors and other applications [1989] 3 MLJ 140, HC (refd)
Malayan Banking Bhd v Gan Kong Yam [1972] 1 MLJ 32, HC (refd)
Malayan United Finance Bhd lwn Cheung Kong Plantation Sdn Bhd dan lain-lain [2000] 2 MLJ 38; [2000] 2 CLJ 601, HC (refd)
Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd & Anor [1999] 4 MLJ 629, HC (refd)
Moschi v Lep Air Services Ltd & Ors [1973] AC 331, HL (refd)
Pearson v Goldsbrough Mort & Co Ltd [1931] SASR 320 (refd)
Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558, HC (refd)
Richards Ex p Lloyd, Official Receiver, Re (1935) 8 ABC 37 (refd)
Ridge v Baldwin & Ors [1964] AC 40, (refd)
Sambu (M) Sdn Bhd v Stone World Sdn Bhd & Anor [1996] MLJU 510; [1997] 1 CLJ 775, HC
Seaton v Heath, Seaton v Burnand [1899] 1 QB 782, CA (refd)
Singapore Souvenir Industry (Pte) Ltd; Re; Dr HC Huang dan Rakan-Rakan v The Liquidator of Singapore Souvenir Industry (Pte) Ltd [1986] 1 MLJ 14, HC (refd)
Sudell; Ex p Simpson, Re [1834] 3 Dea & Ch 792 (refd)
Sunbird Plaza Proprietary Ltd v Maloney & Anor (1988) 166 CLR 245 (refd)
Total Oil Products (Aust) Pty Ltd v Robinson [1970] 1 NSWR 701 (refd)
Trident General Insurance Co Ltd v McNiece Bros Proprietary Ltd (1988) 165 CLR 107, HC (refd)
Ulster Banking Co v Mahaffy (1881) 15 ILT 94 (refd)
WC Angliss Co (Aust) Pty Ltd
Welford v Beazely (1747) 3 Atk 504; 26 ER 1090 (refd)

Western Dominion Investment Co v MacMillan (1925) 2 DLR 442, CA (refd) A
Yeoman Credit Ltd v Latter & Anor [1961] 1 WLR 828, CA (refd)

Legislation referred to
Contracts Act 1950 ss 79, 80
National Land Code B
Rules of the High Court 1980 O 15 r 2(1), 2(2), O 18 r 19, O 18 r 19(1), O 28 r 8(1), O 83 r 3, O 92 r 4

Appeal from: Originating Summons No 31–653 of 1998 (High Court, Ipoh) C

Porres Royan (Shook Lin & Bok) for the plaintiff.
Raam Kumar (Noorehan bt Zakaria and Tan Khay Boon with him) (TY Tan & Partners) for the defendant guarantor.

D

Abdul Malik Ishak JCA (delivering judgment of the court):

THE PARTIES

[1] I shall, for convenience, refer the parties in the following manner. E
Arab-Malaysian Finance Bhd will be referred to as the plaintiff, while Razshah Enterprise Sdn Bhd will be referred to as the defendant guarantor.

[2] The plaintiff was, at all material times, a licensed finance company F
incorporated in Malaysia and presently it goes by the name of Am-Finance Bhd.

[3] The defendant guarantor is a company incorporated in Malaysia and it is the registered proprietor of fifty-three (53) pieces of land held under G
qualified title deeds HS(D) 6975/81 to 7027/81 Lot No PT 37692 to Lot No PT 37744 — all in the Mukim of Ulu Kinta, Perak ('the said lands').

FACTS OF THE CASE

H

[4] By way of a loan agreement dated 6 July 1983 (see pp 62–74 of the additional appeal record ('AAR')), the plaintiff agreed to grant a term loan of RM2.4m ('the loan') to Wan Mokhtar bin Wan Endut ('the borrower') upon the terms and conditions stipulated therein. The borrower was one of the directors of the defendant guarantor. I

[5] On 16 June 1983, the defendant as a guarantor executed a first legal charge over the said lands in favour of the plaintiff in order to secure repayment of the loan and interest thereon together with all other sums and

A moneys that may become payable by the borrower under the said charge. It was on 7 July 1983 that the said charge was registered at the Registry of Titles, Perak vide charge presentation No 17080/83, Jilid 1508, Folio 38 ('the said charge').

B **[6]** After the said charge was duly registered, the plaintiff proceeded to disburse the loan of RM2.4m to the borrower. This was on 8 July 1983.

[7] The borrower was obliged, under the terms of the said loan, to service the monthly interest payments and was required to repay the principal in one C lump sum within two (2) years from the date of the drawdown — and that would be by 8 July 1985.

[8] It was averred that the borrower had defaulted and was indebted to the D plaintiff in a sum in excess of RM2.7m as principal and interest on or about 8 July 1985. Calculation wise, the borrower had only paid to the plaintiff the sums of:

(a) RM30,000 on 7 December 1984;

E (b) RM60,000 on 6 April 1985; and

(c) RM25,000 on 21 May 1985.

[9] By letter dated 7 October 1985, the plaintiff agreed to re structure the repayment of the principal sum upon the request of the borrower. The revised F terms were subject to the borrower updating all the interests outstanding as at that date and that would be in the sum of RM380,199.90.

[10] Unfortunately, the borrower did not comply with the obligations as contained in the plaintiff's letter to him dated 7 October 1985. With this G non-compliance, the arrangement contained in the letter lapsed and it became unenforceable.

[11] By letter dated 12 May 1986 addressed to the borrower and the defendant guarantor, the plaintiff through its then solicitors demanded H payment of the balance outstanding and that came to RM3,215,129.18 calculated as at 18 March 1986.

[12] The following payments were then received by the plaintiff which I were paid into the borrower's account on the relevant dates:

(a) 31 October 1986 for RM100,000.

(b) 6 November 1986 for RM200,000.

(c) 25 November 1986 for RM300,000.

(d) 15 December 1986 for RM150,000.

(e) 24 December 1986 for RM500,000.

(f) 2 January 1987 for RM300,000.

(g) 28 February 1987 for RM150,000.

(h) 30 March 1987 for RM150,000.

(i) 26 May 1987 for RM250,000.

(j) 15 June 1987 for RM200,000.

[13] The borrower requested to extend the repayment due date of the principal outstanding and the plaintiff by letter dated 10 July 1987 agreed to the borrower's request. The revised terms were expressly subject to the borrower updating all the outstanding interests which came up to RM219,734.39 based on the principal outstanding sum of RM1,169,734.39.

[14] By the same letter dated 10 July 1987, the plaintiff also gave notice to the borrower in regard to the following changes:

(a) that the interest rate ('the prescribed rate') has been reduced from 15%pa on monthly rests to 4½ %pa above the plaintiff's base lending rate with effect from 1 May 1987; and

(b) that damages on late payment (additional interest) has been reduced from 0.05% per day to 0.0493% with effect from 1 February 1987 and that with effect from 1 July 1987 it would be computed at 3% above the prescribed rate.

[15] The borrower failed to update all the outstanding interests as required by the plaintiff in the plaintiff's letter dated 10 July 1987.

[16] On 23 November 1987, the borrower made payment to the plaintiff in the sum of RM100,000.

[17] By way of a letter dated 29 April 1988 from the plaintiff's solicitors to the defendant guarantor, the plaintiff demanded payment of the sum of RM1,218,629.84 owing as at 31 March 1988 together with interest at 14%pa from 1 April 1988. It was averred that the defendant guarantor received the letter of demand on 8 May 1988.

[18] It was said that the defendant guarantor failed not only to effect the full payment of the amount outstanding but had also committed a breach of the terms of the said charge ('the said breach').

[19] The said breach continued for a period of more than seven (7) days and this prompted the plaintiff through its solicitors to cause a statutory notice in Form 16D dated 27 May 1988 to be issued against the defendant guarantor requiring the latter to remedy the said breach within a further period of seven (7) days from the service thereof, failing which an order for sale would be applied for. On 30 May 1988, the Form 16D notice was served on the defendant guarantor.

[20] It was said that the defendant guarantor was still persistent in refusing to remedy the said breach.

[21] By virtue of O 83 r 3 of the Rules of the High Court 1980 ('RHC'), the plaintiff advanced the following particulars:

(a) the amount of the advance	RM2,400,000
(b) the amount of repayment	RM2,515,000
(c) the amount of interest or instalments in arrears as at 30 September 2003	RM4,340,343.68
(d) the amount remaining due under the said charge as at 30 September 2003	RM4,473,198.58
(e) the interest that is due for the months of	
October 2003	RM522.93
November 2003	RM522.93
December 2003	RM522.93

[22] Flowing from all these, the plaintiff sought an order that the three land titles be sold under the National Land Code (Act 56) in order to satisfy the sums that were said to be due to the plaintiff. All the other ancillary orders which the plaintiff sought can be seen in the statement of claim at pp 43–45 of the appeal record ('AR').

[23] It was on 9 July 1988 that the plaintiff commenced Originating Summons No 31–653 of 1988 in the High Court at Ipoh ('the charge action') for an order for the sale of the said lands. It must be emphasised that the charge action has had a chequered history.

[24] Permit me to briefly narrate the chequered history.

[25] On 14 December 1992 the charge action was heard by the late Mohtar Abdullah J (as he then was). The learned judge found that there was a '*cause to the contrary*' and that an order for sale should not be granted at that stage of the proceedings. The learned judge also directed, inter alia, that the

proceedings to be continued '*as if the cause or matter had been begun by writ*' pursuant to O 28 r 8(1) of the RHC.

[26] On 16 July 1998, Pajan Singh Gill J (as he then was) ordered, inter alia, that the statement of agreed facts and the statement of the issues in dispute be filed together with the written submissions and that all these must be exchanged between the parties.

[27] On 30 June 1999, Pajan Singh Gill J (as he then was) directed counsel on both sides to address the issue of whether the matter was res judicata and could not be heard any further.

[28] On 29 July 1997, Pajan Singh Gill J (as he then was) held that the doctrine of res judicata applied and he dismissed the plaintiff's application for an order for sale and he too dismissed the defendant guarantor's counterclaim.

[29] Aggrieved by the decision that was handed down on 29 July 1997, both parties lodged an appeal.

[30] On 24 September 2003, this court dismissed both the appeals and remitted both the plaintiff's charge action and the defendant guarantor's counterclaim to the High Court for case management on 1 December 2003 with ancillary directions for parties to file and serve their respective pleadings.

[31] In due course, the parties filed and served their pleadings. The plaintiff filed its statement of claim dated 6 October 2003 as seen at pp 25–45 of the AR. The defendant guarantor filed its statement of defence and counterclaim dated 21 October 2003 as reflected at pp 46–53 of the AR. The plaintiff then filed its reply and defence to the counterclaim dated 11 November 2003 as seen at pp 54–59 of the AR.

[32] For purposes of this appeal before us, only the counterclaim at pp 50–52 of the AR is relevant.

THE COUNTERCLAIM

[33] The defendant guarantor based its counterclaim on two letters. The first letter was dated 7 October 1985 as found at pp 95–96 of the AR. The second letter was dated 10 July 1997 as seen at pp 97–98 of the AR. Both these two letters were from the plaintiff to the borrower.

[34] The first letter to the borrower was worded in this way:

RE: TERM LOAN OF $2.4M

Your letter dated 25th February 1985 refers. In response to your request, we are pleased to inform you that our Board has agreed to re-structure the principal repayment for the above facility. The lump sum repayment scheduled on 8th July 1985 is to be revised as follows:

(i) Monthly servicing of interest.

(ii) Six principal repayments as per schedule below:

Principal Repayment ($)	Month End
200,000/-	November 1985
500,000/-	January 1986
500,000/-	March 1986
500,000/-	May 1986
500,000/-	July 1986
200,000/-	September 1986

or upon redemption of title whichever is earlier. In the event any redemption is applied the subsequent principal repayments shall be reduced equally and accordingly.

The redemption sum of (the) shophouses are at $65,000/- per title.

The above revised terms are subject to your updating of all interests outstanding to-date.

Kindly signify your acceptance by returning the duplicate copy of this letter duly signed within the next two (2) weeks from the date hereof.

The second letter addressed to the borrower was worded in this fashion:

RE: TERM LOAN OF $2.4M

We refer to our Letter of Offer dated 28th May 1983 and thereafter letter dated 7th October 1985.

In response to your further request, we are pleased to inform you that our Board has agreed to extend the repayment due date of the principal balance outstanding on the above facility as follows:

(i) Monthly servicing of interest on principal balance outstanding.

(ii) One lump sum repayment of principal outstanding on 31st December 1987 or upon redemption of (the) shophouse titles whichever is earlier.

The redemption sum of (the) shophouse titles shall be at $65,000per title.

Further, the interest rate has been reduced from fifteen per cent (15.0%) per annum on monthly rest to four and a half per cent (4.5%) above our Base Lending Rate currently pegged at nine and a quarter per cent (9.25%) or thirteen and three quarter per cent (13.75%) per annum on monthly rest (hereinafter referred as the 'Prescribed Rate' with effect from 1st May, 1987).

Similarly, damages on late payments (additional interests) is reduced from 0.05% per day to 0.0493% per day with effect from 1st February 1987. Thereafter effective 1st July 1987 it shall be three per cent (3.0%) above the 'Prescribed Rate'. The above revised terms are subject to your updating of all interest outstanding to-date.

Kindly signify your acceptance of the above by returning the duplicate copy of this letter duly signed within the next three (3) weeks from the date hereof.

[35] In its original Malay language text, the counterclaim was worded as follows (see pp 50–52 of the AR):

TUNTUTAN BALAS

21. Defendan mengulangi perenggan 1 hingga 20 di atas dan menegaskan bahawa Plaintif perlu menjelaskan jumlah-jumlah yang dinyatakan dengan tepat.

22. Defendan menyatakan bahawa Plaintif telah memungkiri persetujuan tersebut kerana gagal untuk melepaskan beberapa hakmilik walaupun Peminjam telahpun membuat bayaran sebanyak RM2,515,000 terhadap jumlah principal seperti yang telah dipersetujui.

23. Akibat kemungkiran Plaintif, Defendan mengalami kerugian teruk kerana tidak dapat menjalankan pembangunan projek-projek yang dicadangkan di atas tanah-tanah tersebut. Tambahan lagi, hakmilik-hakmilik tersebut adalah tapak projek perniagaan yang dicadangkan dijual.

24. Setelah mengambilkira jumlah yang telah dibayar oleh Peminjam setakat akhir bulan Jun 1991 (iaitu sebanyak RM2,515,000.00), Plaintif seharusnya melepaskan lebih kurang 38 hakmilik.

25. Pada Jun 1991, harga bagi 1 unit rumahkedai dianggarkan pada RM160,000 manakala kos yang untuk menyiapkannya adalah RM57,000. Oleh itu, jumlah keuntungan setelah mengambilkira 37 hakmilik ialah RM3,811,000. Bagi hakmilik PT 37692, jumlah keuntungan bersih adalah RM2,000,000. Jumlah besar keuntungan bernilai RM5,811,000.

26. Oleh itu, Defendan menuntutbalas terhadap Plaintif:

    (i) jumlah wang sebanyak RM5,811,000.00;

(ii) secara alternatif, suatu taksiran dibuat untuk menentukan jumlah kerugian yang dialami Defendan akibat kegagalan Plaintif untuk melepaskan hakmilik Defendan;

(iii) faedah pada kadar 8% setahun ke atas (i) dari tahun 1986 dan berterusan sehingga penyelesaian penuh;

(iv) kos; dan

(v) apa-apa perintah lanjut yang difikirkan sesuai dan berpatutan oleh Mahkamah yang mulia ini.

[36] A counterclaim is a separate action by the defendant guarantor and it is a claim by the defendant guarantor against the plaintiff. It is brought in the plaintiff's action against the plaintiff as envisaged in O 15 r 2(1) of the RHC. In a counterclaim, the defendant guarantor is treated as the plaintiff and the plaintiff is treated as a defendant by virtue of O 15 r 2(2) of the RHC.

[37] According to *Beddall v Maitland* (1881) 17 Ch D 174, a counterclaim may even set up a cause of action that accrued after the plaintiff has commenced a cause of action.

[38] The defence to the counterclaim can be seen at pp 57–59 of the AR and it was worded in this manner:

2. At the outset, the Plaintiff contends that the Defendant's counterclaim is misconceived in that the Defendant was not a party to the agreements or arrangements between the Plaintiff and the Borrower referred to in paragraphs 8 and 13 of the statement of claim ('the said agreements or arrangements') upon which the Defendant bases its alleged claims. The Plaintiff shall apply to strike out the counterclaim.

3. Without prejudice to the above paragraph, the Plaintiff avers that:

(a) the said agreements or arrangements were expressly subject to the Borrower updating all interests outstanding as at the respective dates;

(b) the Borrower did not comply with his obligations in both the said agreements or arrangements;

(c) consequently no claim lay against the Plaintiff for breach of the said agreements or arrangements;

(d) in any event, the Defendant's counterclaim is statute barred.

4. Save and except for the admissions made herein, the Plaintiff denies each and every averment contained in the Defendant's counterclaim as if the same were set out and derived seriatim.

5. Wherefore the Plaintiff prays that the counterclaim be dismissed with costs.

[39] The defence to a counterclaim is always treated as if it were a defence to a statement of claim.

ORDER 18 R 19 OF THE RHC

[40] By way of a summons in chambers dated 17 December 2003 as reflected at pp 19–20 of the AR, the plaintiff sought to strike out the counterclaim of the defendant guarantor under O 18 r 19 of the RHC and under the inherent jurisdiction of the court.

[41] Imploring the court to strike out the counterclaim under the inherent jurisdiction of the court is, in fact, asking the court '*to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court*' (see O 92 r 4 of the RHC; *Re Singapore Souvenir Industry (Pte) Ltd* [1986] 1 MLJ 14; *Low Fong Mei & Anor v Ko Teck Siang & Ors and other applications* [1989] 3 MLJ 140 and *Jamir Hassan v Kang Min* [1992] 2 MLJ 46).

[42] The senior assistant registrar refused to accede to the plaintiff's application to strike out the defendant guarantor's counterclaim.

[43] But, on appeal, the High Court allowed the plaintiff's application to strike out the defendant guarantor's counterclaim based on two grounds, firstly, that the defendant guarantor was not a party to the loan agreement and, secondly, the defendant guarantor has no locus standi to commence the counterclaim against the plaintiff.

[44] Aggrieved by the decision of the High Court, the defendant guarantor filed a notice of appeal as seen at pp 8–10 of the AR to this court.

ANALYSIS

[45] The plaintiff's application to strike out the defendant guarantor's counterclaim was flawed for the simple reason that it failed to specify under what limb of O 18 r 19 of the RHC was the application made. While sitting on the High Court bench, I did say in *Sambu (M) Sdn Bhd v Stone World Sdn Bhd & Anor* [1996] MLJU 510; [1997] 1 CLJ 775, at p 778 that:

> The word 'or' appears between (a), (b), (c) and (d) of O 18 r 19(1) of the RHC and in ordinary usage the word 'or' is said to be disjunctive (*Uddin v Associated Portland Cement Manufacturers Ltd* [1965] 2 QB 582; *R v Surrey Quarter Sessions, ex parte Commissioner of Metropolitan Police* [1963] 1 QB 990). In my judgment,

A the second defendant when resorting to O 18 r 19(1) of the RHC must be very specific and must not cumulatively add (a), (b), (c), (d) together and lump them as one as it would run counter to the explicit provisions of r 19(2) of O 18 of the RHC.

B

[46] It is comforting to know that *Sambu (M) Sdn Bhd v Stone World Sdn Bhd & Anor* was vigorously applied by Faiza Tamby Chik J in *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd & Anor* [1999] 4 MLJ 629 and by Abdul Hamid Mohamad J (later the Chief Justice of Malaysia) in *Malayan United Finance Bhd lwn Cheung Kong Plantation Sdn Bhd dan lain-lain* [2000] 2 MLJ 38; [2000] 2 CLJ 601.

C

[47] Yet another drawback was this. That the plaintiff's application to strike out the defendant guarantor's counterclaim was made 9 years 2 months 21 days too late after the consent order to convert the originating summons dated 9 July 1988 (encl 2) and all the related affidavits to the writ action was made on 26 September 1994.

D

[48] To be precise, the consent order was made on 26 September 1994 as seen at pp 41–42 of the AR to convert the originating summons dated 9 July 1988 (encl 2) and the affidavit that was affirmed by Lutfiah bt Ismail dated 6 July 1988 and the affidavit in reply affirmed by both Lutfiah bt Ismail and Nordin bin Abdul Manaf dated 19 July 1989 together with the affidavit affirmed by Teoh Guat Khim dated 12 April 1991 and all the other affidavits affirmed by the plaintiff or its representative into a writ action, statement of claim, reply to the statement of defence, and defence to the counterclaim in this action.

E

F

[49] Again by the same consent order dated 26 September 1994 at p 42 of the AR, it was further ordered that the affidavit that was affirmed by Salemah bt Ishak dated 17 April 1989 and the affidavit in reply affirmed by Salemah bt Ishak dated 31 July 1990 together with the affidavit affirmed by Salemah bte Ishak dated 11 February 1991 as well as all the other affidavits affirmed by the defendant or its representative be converted as the statement of defence and the counterclaim in this action.

G

H

[50] The delay of 9 years 2 months 21 days was arrived at by using the date wherein the plaintiff sought to strike out the defendant guarantor's counterclaim on 17 December 2003 minus the date wherein the consent order dated 26 September 1994 was entered into by the parties.

I

[51] Indeed, seen in this light, there was certainly delay in filing the application to strike out the defendant guarantor's counterclaim and this

delay was not considered by the High Court at all (*Loh Eng Leong & Ors v Lo Mu Sen & Sons Sdn Bhd & Anor* [2000] 5 MLJ 529; [1999] 5 CLJ 510). A

[52] It was argued by the plaintiff that the delay issue was baseless because the application to strike out the defendant guarantor's counterclaim was filed promptly on 17 December 2003 after the defendant guarantor had filed its statement of defence and counterclaim on 21 October 2003. The delay, according to the plaintiff, was only one (1) month and 26 days. B

[53] Standing on firmer ground, the plaintiff argued that an application to strike out the defendant guarantor's counterclaim may be made according to O 18 r 19 of the RHC '*at any stage of the proceedings*' and that would, according to the plaintiff, stifle the issue of delay raised by the defendant guarantor. Zakaria Yatim J (later FCJ) dealt with the issue of delay in an O 18 application in the case of *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman; Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman & Ors* [1987] 2 MLJ 633, and this was what His Lordship said at p 635 of the report: C D

> The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial (see *The Supreme Court Practice*, 1985, Vol 1, at p 304). E F

[54] In *Malayan Banking Bhd v Gan Kong Yam* [1972] 1 MLJ 32, the delay of almost seven (7) months by the plaintiff in filing an application to strike out certain paragraphs of the statement of defence as disclosing no reasonable defence or as being frivolous or vexatious or tending to delay the fair trial of the action after the plaintiff had filed its notice of entry of trial was held not to be fatal. G

[55] And in *Doree Industries (M) Sdn Bhd & Ors v Sri Ram & Co (sued as a firm) & Ors* [2001] 6 MLJ 532, the delay of more than one year after the filing of the statement of defence was held not fatal to the second defendant's application made pursuant to O 18 r 19(1) of the RHC because the trial date as yet to be fixed. H

[56] Here, the delay was inordinately long. Nine (9) years two (2) months twenty-one (21) days are certainly far too long to endure. Even the delay of one (1) month and twenty-six (26) days cannot be condoned. It is certainly an old case. The plaintiff filed the originating summons on 9 July 1988. And the High Court has yet to hear the counterclaim. I

[57] It was argued that the defendant guarantor's counterclaim was based solely on the two letters between the plaintiff and the borrower and that being the case it was emphasised that the defendant guarantor was not privy to the contractual agreements. Flowing from that it was argued that the defendant guarantor has no locus standi to sue the plaintiff by way of a counterclaim based on the two letters. According to *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170 (PC), only parties to an agreement can sue on that agreement or can enforce that agreement. And this simple principle of law has been followed by this court in *Law Kam Loy & Anor v Boltex Sdn Bhd & 5 Ors* [2005] 4 AMR 525 when Gopal Sri Ram JCA writing for this court aptly said at pp 528–529 of the report:

> And since Boltex was not a party to exh P1, any promise that may have been made by the second to the sixth defendants is not enforceable against it by reason of the doctrine of privity of contract.

[58] It is germane to mention that the doctrine of privity of contract is a creature of the common law. The doctrine means that a non-party cannot bring an action on the contract. But the doctrine is not universally acceptable. For instance in *FC Seck Trading As Oversea Structural Company v Wong And Lee* [1940] MLJ 182 where the plaintiff there sued for money paid to the defendants there under a mistake of fact, Terrell Acting CJ held that the doctrine of privity of contract should not apply. And the majority of the High Court of Australia (Mason CJ, Wilson J and Toohey J) were of the view in *Trident General Insurance Co Ltd v McNiece Bros Proprietary Ltd* (1988) 165 CLR 107 that the time had arrived for the rejection of the privity doctrine.

[59] Our Contracts Act 1950 (Act 136) has no express provision pertaining to the doctrine of privity of contract. In fact, *Kepong Prospecting* gives the gloom picture that the doctrine still applies in Malaysia. Indeed Mohamed Dzaiddin J (who later rose to be the Chief Justice of Malaysia) relied on *Kepong Prospecting* and aptly said in *Fima Palmbulk Services Sdn Bhd v Suruhanjaya Pelabuhan Pulau Pinang & Anor* [1988] 1 MLJ 269, at p 271:

> It is clear that the English doctrine of privity of contract applies to our law of contract.

[60] While acknowledging the supremacy of the doctrine of privity of contract, the factual matrix of the present appeal must not be overlooked. It must be recalled that the borrower was one of the directors of the defendant and that the defendant was the guarantor under the loan agreement. The defendant guarantor guaranteed the loan extended by the plaintiff to the borrower by executing a first legal charge over the said lands in favour of the plaintiff in order to secure repayment of the loan that may become payable

by the borrower under the said charge. Seen in this light, the two letters were rightly relied upon by the defendant to support its counterclaim against the plaintiff.

[61] According to s 79 of the Contracts Act 1950 (Act 136):

> 'Contract of guarantee', 'surety', 'principal debtor', and 'creditor'
>
> 79 A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of which default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

[62] And s 80 of the Contracts Act 1950 (Act 136) talks about consideration for a guarantee and it is worded as follows:

> Consideration for guarantee
>
> 80 Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

[63] Illustrations (a) and (b) of s 80 of the Contracts Act 1950 (Act 136) are relevant to the occasion at hand and they are worded as follows:

(a) *B* requests *A* to sell and deliver to him goods on credit. *A* agrees to do so, provided *C* will guarantee the payment of the price of the goods, *C* promises to guarantee the payment in consideration of *A*'s promise to deliver the goods. This is a sufficient consideration for *C*'s promise.

(b) *A* sells and delivers goods to *B*. *C* afterwards requests *A* to forbear to sue *B* for the debt for a year and promises that, if he does so, *C* will pay for them in default of payment by *B*. *A* agrees to forbear as requested. This is a sufficient consideration for *C*'s promise.

[64] *Yeoman Credit Ltd v Latter & Anor* [1961] 1 WLR 828, (CA); *Sunbird Plaza Proprietary Ltd v Maloney & Anor* (1988) 166 CLR 245; *Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd* [1965] NSWR 1504; *Total Oil Products (Aust) Pty Ltd v Robinson* [1970] 1 NSWR 701; *General Surety and Guarantee Co Ltd v Francis Parker Ltd* (1977) 6 BLR 16; *Re Richards Ex p Lloyd, Official Receiver* (1935) 8 ABC 37; *WC Angliss Co (Aust) Pty Ltd*; *Browing and Another, Assignees of Morgan, a Bankrupt v Stallard* [1814] 5 Taunt 450;128 ER 764; *Commercial Banking Co of Sydney Ltd v Patrick Intermarine Acceptances Ltd (In Liq) & Anor* (1978) 52 ALJR 404, (PC), at p 406; and *Western Dominion Investment Co v MacMillan* (1925) 2 DLR 442 and affirmed and reported in (1925) 4 DLR 562, (CA)

defined the meaning of the word '*guarantee*' as a binding promise of a person to be answerable for the present or future debt or obligation of another person when that other person defaults.

[65] Lord Diplock in style described the guarantor's obligation in *Moschi v Lep Air Services Ltd and another* [1973] AC 331 as nothing more than '*to see to it that the debtor performed his own obligations to the creditor*' (see p 348 of the report).

[66] It is quite easy to paraphrase what s 79 of the Contracts Act 1950 (Act 136) says. It is this. That the person who makes the promise to be answerable for the debt or obligation of another is called the guarantor or the surety; while the person to whom the promise is made is called the creditor; and the person on whose behalf the promise is made is called the principal debtor. Here, the defendant was the guarantor or the surety. The borrower was the principal debtor while the plaintiff was the creditor. It was a tripartite relationship based on the loan agreement. The expressed intention of the parties as set out in the loan agreement must be given effect.

[67] In criticising the doctrine of privity of contract, Steyn LJ's remarks in *Darlington Borough Council v Wiltshier Northern Ltd & Anor* [1995] 1 WLR 68 at p 76 bear repetition. This was what His Lordship said:

> The case for recognising a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties.

[68] The loan agreement is in the nature of a contract of guarantee. The elements of a guarantee are certainly present here. I can do no better than to quote what Jordan CJ said *Jowitt v Callaghan* (1938) 38 SR (NSW) 512, at p 516:

> A contract of guarantee or suretyship is a contract between two persons which is intended by them to secure the performance of the obligation of a third person to one of them. The existence, present or future, of the obligation of a third person, and an intention in the parties to the contract to secure the performance of that obligation, are essential features of a contract of guarantee. If these elements are present, the contract is one of guarantee whether the promise be collateral to the promise of a principal obligor and in the nature of a distinct and separate promise to perform the principal obligation if he does not: *Inland Revenue Commissioners v Holder* [1931] 2 KB 81 at pp 101–102; [1932] AC 624 at p 634; *Elder v Northcott* [1930] 2 Ch 422 at p 430; or whether it be a joint promise with the

principal obligor by virtue of which an immediate obligation is assumed to the obligee which is joint with that of the principal obligor: *Permanent Trustee Co of NSW Ltd v Hinks* (1934) 34 SR (NSW) 130 (in which case, there is suretyship in equity though not at common law: *Wauthier v Wilson* (1912) 28 TLR 239); and whether the promise be a promise to be personally liable if the principal obligor does not perform the obligation, or a promise merely that certain property of the promisor shall be a security for the performance of the principal obligation: *Re Conley; Ex parte The Trustee v Barclays Bank Ltd* [1938] 2 All ER 127.

[69] It is quite easy to ascertain whether a contract is one of guarantee or otherwise. Firstly, just look at the natural meaning to be attached to the words employed in the contract (*Pearson v Goldsbrough Mort & Co Ltd* [1931] SASR 320 at p 327; *Edwards v Lennon (a)* [1866] 6 SCR (NSW) Eq 18; and *AA Davison Pty Ltd v Seabrook* (1931) 37 ALR 156). Secondly, one must look at the substantial character of the contract itself (*Seaton v Heath, Seaton v Burnand* [1899] 1 QB 782, (CA)). Thirdly, the need to look at the nature of the transaction between the parties (*Re Sudell; Ex p Simpson* [1834] 3 Dea & Ch 792).

[70] There is no set formula to create a guarantee (*Welford v Beazely* (1747) 3 Atk 504; 26 ER 1090; and *Bradley Bros Ltd v Scott* [1923] NZLR 1050, (SC)).

[71] Words like, '*You can tell C or anyone that will supply him with hay, that I will accept C's order payable in the Spring*' (*Colwell v Hatfield And Another* [1832] 1 NBR 282, (SC)), are sufficient to create a guarantee. But the words employed must not be equivocal (*Ulster Banking Co v Mahaffy* (1881) 15 ILT 94; and *Bancroft v Milligan* (1913) 16 DLR 648, (SC)).

[72] Next, the argument that the defendant guarantor has no locus standi to commence the counterclaim against the plaintiff has no merit at all. Bearing in mind the tripartite relationship between the parties under the loan agreement, the defendant guarantor certainly has the necessary locus standi to file the counterclaim based on the two letters against the plaintiff. The defendant guarantor created a first legal charge over the said lands in favour of the plaintiff in order to secure the loan facility to the borrower. If that do not give locus standi to the defendant guarantor to file the counterclaim against the plaintiff, I do not know what is.

[73] It is obvious that when the plaintiff raised the locus standi issue it was meant to exclude the defendant guarantor from commencing the counterclaim against the plaintiff.

[74] If the chief constable in *Ridge v Baldwin & Ors* [1964] AC 40 had not decided to challenge his dismissal, would anyone else have been able to do so? What about the chief constable's wife and children whose main source of income might diminish as a result of his dismissal — would they have locus standi to challenge his dismissal? These are interesting questions for us to ponder.

[75] Can someone else other than the defendant guarantor file the counterclaim against the plaintiff? The answer would certainly be in the negative. It was wrong to deny locus standi to the defendant guarantor. If the defendant guarantor has no locus standi, why did the plaintiff sue the defendant guarantor? The borrower cannot exist without the defendant guarantor. The latter was not a stranger to the loan agreement.

[76] The counterclaim was not plainly or evidently unsustainable in law (*Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558; and *Affin Bank Bhd v Eye Bee Sdn Bhd* [2005] 7 MLJ 1). The counterclaim should not be struck out.

[77] For the reasons adumbrated above, we allowed the defendant guarantor's appeal with costs. Deposit should be refunded to the defendant guarantor.

[78] I have shown this judgment in draft to my learned brothers Tengku Baharudin Shah JCA and Low Hop Bing JCA and they have kindly agreed to make it the judgment of this court.

Defendant's appeal allowed with costs.

Reported by Andrew Christopher Simon